

No. 89-1078

Supreme Court, U.S.  
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IN THE  
**Supreme Court of the United States**

October Term, 1989

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ROBERT CASEY, Governor of the Commonwealth of  
Pennsylvania, JOHN F. WHITE, Secretary of the Pennsylvania  
Department of Public Welfare, and DAVID S. FEINBERG,  
Director of the Bureau of Policy and Program Development of  
the Pennsylvania Department of Public Welfare,

*Petitioners,*

v.

WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

*Respondent.*

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**RESPONDENT'S BRIEF IN OPPOSITION**

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February 2, 1990

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## **RULE 28.1 LISTING**

West Virginia University Hospitals, Inc., is a public corporation created by the West Virginia Legislature. See 18-11c-2(d) of the Code of West Virginia. It has the following subsidiary (not wholly owned) and affiliate:

Subsidiary: HealthNet Insurance Company

Affiliate: Health, Education and Research Corporation

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*RESPONDENT'S BRIEF IN OPPOSITION*

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STATEMENT OF THE CASE

The statement of the case by petitioners (hereinafter referred to as "Pennsylvania") requires a brief supplementation.

Prior to the the filing of Pennsylvania's petition for a writ of certiorari, West Virginia University Hospitals, Inc., filed its own petition for a writ of certiorari. See West Virginia University Hospitals, Inc. v. Casey, petition for cert. filed, 58 U.S.L.W. 3430 (U.S. December 22, 1989) (No. 89-994). The petition of West Virginia University Hospitals, Inc. (hereinafter referred to as

"WVUH") presents the question whether an award of attorneys' fees under 42 U.S.C. § 1988 may include compensation for expert witnesses.

## ARGUMENT

WVUH cannot deny the importance of the question presented by Pennsylvania. This Court has already granted a writ of certiorari and heard oral argument on the identical issue concerning 42 U.S.C. § 1983 in Baliles v. Virginia Hospital Association, 110 S. Ct. 49 (1989) (No. 88-2043).

The more important issue, requiring this Court's attention, is the one presented in WVUH's petition concerning the compensability of expert witness fees under 42 U.S.C. § 1988. That issue is an important one and is part of a multi-circuit conflict.

Even if the Court concludes in Baliles that hospitals do not have a remedy under 42 U.S.C. § 1983 to enforce the provisions of the Social Security Act, WVUH's issue concerning expert witness fees under 42 U.S.C. § 1988 will not become moot. That is because WVUH's case involves not only violations of the Social Security Act but also a violation of the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause violation is a sufficient basis on which to invoke 42 U.S.C. § 1983, independent of any implied cause of action under the Social Security Act.

The District Court clearly held that Pennsylvania's discrimination in medicaid payments between in-state hospitals and out-of-state hospitals violated the Fourteenth Amendment. West Virginia University Hospitals, Inc. v. Casey, 701 F. Supp. 496, 526 (M.D. Pa. 1988); Appendix to Pennsylvania's Petition at 274a. Although the Court of Appeals for the Third Circuit did not reach the issue of the Fourteenth Amendment, this Court is not prevented from considering the attorneys' fees issue based



upon the District Court's holding on the Fourteenth Amendment. See Langnes v. Green, 282 U.S. 531, 536-539 (1931). Accordingly, the result in Baliles will not affect the justiciability of the attorneys' fees issue presented in WVUH's petition.

### CONCLUSION

Neither action by this Court on Pennsylvania's petition nor a decision by this Court in Baliles v. Virginia Hospital Association will affect the more pressing issue presented in WVUH's petition. Therefore, WVUH asks: (1) that the Court hold in abeyance any action upon Pennsylvania's petition until Baliles is decided; and (2) in the interim, that the Court grant WVUH's petition for a writ of certiorari on the important issue concerning the compensability of expert witness fees under 42 U.S.C. § 1988.

Respectfully submitted,

**WEST VIRGINIA UNIVERSITY  
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